IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2007

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

W.P.No.21267 of 2007

Reliance Generators Pvt. Ltd.,
rep. by its Managing Director ... Petitioner

vs.

1. The Special Commissioner &
Commissioner of Commercial Taxes,
Ezhilagam, Chepauk,
Chennai-5.

2. The Commercial Tax Officer,
Vadapalani II Assessment Circle,
621, Anna Salai, Sire Mansion,
Chennai-6. ... Respondents

Writ petition is filed under Article 226 of the Constitution of India for issuance of a writ of Certiorarified Mandamus, to call for the records on the file of the first respondent in his proceedings in Clarification No.87 of 2006, dated 24.07.2006, quash the same as invalid, illegal and unconstitutional and direct the first respondent to issue clarification afresh after granting the petitioner an opportunity of being heard and after considering relevant material.

For Petitioner : Mr.T.V.Lakshmanan

For Respondents : Mr.R.Mahadevan,
Government Advocate

O R D E R

The petitioner has sought for a Writ of Certiorarified Mandamus to quash the clarification No.87 of 2006, dated 24.07.2006 and for a direction to the first respondent to issue clarification afresh, after giving opportunity to the petitioner of being heard and after considering relevant materials.

2. The case of the petitioner is as follows:

The petitioner is carrying on business of supplying, installing, testing and commissioning diesel generators. Their transactions are exclusively with the Government Departments, predominantly Bharat Sanchar Nigam Limited (hereinafter called as BSNL), which previously functioned as Department of Telecom (hereinafter called as DoT). The petitioner is an assessee on the files of the second respondent herein. According to them, as per G.O.Ms.No.68, dated 18.08.2001, in respect of sale of telecom cables to BSNL and Mahanagar Telephone Nigam Limited (hereinafter called as MTNL), the rate of tax for sale of Telecom cables to BSNL and MTNL was reduced from 12% to 4%. Subsequently, a notification was issued in G.O.Ms.No.32, dated 27.03.2002, with effect from 01.04.2002, wherein the expression "telecom cables sold to BSNL" was varied and read as "sale of

switching equipment, sound recording and transmitting equipment of every description including telephones, intercom devices, telephone cables, fibre optic cables, switch board power supply based power plant for telecom application, parts and accessories thereof and batteries of power backup systems for equipments only to BSNL".

3. The petitioner has further submitted that the main function of the diesel generating system is to generate electricity, ie., power, along with the other equipment such as battery, cabling, transformer etc., which forms a power supply based power plant. The power so generated and distributed by the power plant is used in the telephone exchange for the power plant for the purpose of running the telecom installations like tower and equipments. As the issue was a recurring question for every assessment year and in order to avoid dispute during assessment year, the petitioner sought clarification from the first respondent, regarding the applicability of the Notification No.II(1)/CT/19 (b-17) 2002-GO Ms.No.32 CT (B2), dated 27.03.2002, from 01.04.2002, granting concessional rate of tax in respect of "sale of switching equipment, sound recording and transmitting equipment of every description including telephones, intercom devices, telephone cables, fibre optic cables, switch board, power supply based power plant for telecom application, parts and accessories thereof and batteries for power backup systems for equipment only to Tvl. Bharat Sanchar Nigam Ltd". The Special Commissioner and Commissioner for Commercial Taxes, the first respondent herein, by his letter dated 24.07.2006, clarified as follows:

"with reference to your letter dated 03.05.2006, you are informed that "Diesel Generating Set" is not eligible for the concessional rate granted in notification No.II(1)/CT/19 (b-17) 2002-GO Ms.No.32 CT (B2), dated 27.03.2002."

4. Assailing the clarification, the petitioner has contended that the first respondent has arbitrarily determined the issue without considering the relevant materials placed before him. The petitioner has further contended that the first respondent has violated the Principles of Natural Justice, as the petitioner has not been heard, before passing the impugned order. It is the further contention of the petitioner that when the BSNL, by its letter dated 30.06.2006, through their technically qualified official, opined that the generators will come under the preview of the power supply based power plant for telecom application, the first respondent ought to have accepted the expert opinion and clarified that, "diesel generator sets" manufactured by the petitioner and supplied to the BSNL and MTNL are power supply based power plant for telecom application.

5. Mr.T.V.Lakshmanan, learned counsel appearing for the petitioner submitted that the impugned order is a cryptic order and no reasons have been assigned for coming to the conclusion that the "diesel generating set" is not eligible for concessional rate, as per G.O.Ms.No.32, dated 27.03.2002. He further submitted that the Commissioner of Commercial Taxes, the first respondent herein, is not a technical expert to examine as to whether "diesel generating sets" would fall within the definition of "switch board power supply for power plant for telecom application" and under such circumstances, he ought to have obtained opinion of the technical experts, who actually deal with the goods or should have accepted the opinion given by the technically qualified person from BSNL and granted the concessional rate of tax. Relying on the decisions in Panama Chemical Works v Union of India reported in 1992 (62) ELT 24, Assistant Collector of Customs v. East Anglia Plastics (India) Ltd., reported in 1994(74) ELT 22 and Collector of Customs, Bombay v. United Electrical Industries Ltd., reported in 1999 (108) ELT 609 (S.C), learned counsel for the petitioner submitted that the scientific and technical meaning to a product is more relevant for classification of the item and in case of any doubt in interpreting the tariff entry occurring in taxing statute, what is understood and meant in trade parlance between the persons in the trade should be accepted and that there should not be any departure.

6. Referring to Paragraph 26 of the judgment in Panama Chemical Works v Union of India reported in 1992 (62) ELT 24, learned counsel for the petitioner submitted that the general principle of interpreting of tariff entries in a Taxing statute is the nomenclature and understanding between the persons in the trade. Placing strong reliance on the opinion given by the BSNL, he submitted that when the department, which is using the goods in trade, has certified that Diesel Generating Sets will come under the preview of the power supply based power plant for telecom application, the Commissioner of Commercial Taxes, the first respondent herein, who is not a technically qualified person, cannot issue a clarification. Yet another judgment cited by the counsel for the petitioner in support of the same preposition is Assistant Collector of Customs v. East Anglia Plastics (India) Ltd., reported in 1994(74) ELT 22.

7. In so far as his contention that opinion of the technically qualified person has to be applied to give the true import and meaning used in the exemption notice, learned counsel for the petitioner relied on the decision in Collector of Customs, Bombay v. United Electrical Industries Ltd., reported in 1999 (108) ELT 609 (S.C).

8. Mr.R.Mahadevan, learned Government Advocate submitted that "diesel generating sets" are classified in Entry 5(i) of Part 'E' of the First Schedule, taxable at 16% on the first sale, with effect from 27.03.2002 and therefore, there is no ambiguity in the clarification issued by the respondent. He further submitted that the intention of the Government in reducing the rate of tax is only with reference to switching equipments, sound recording and transmitting equipments relating to telephone devices etc., switch Board power supply based power plant that are used in telecom application, which is no way be equated with the "diesel generating set". He further submitted that the equipments, parts and other accessories described in the notification issued in G.O.Ms.No.32, dated 27.03.2002, are electronic systems and the "diesel generating set" cannot be described or meant as "Switch Board Power Supply based Power Plant for telecom applications".

9. Learned Additional Government Pleader further submitted that as there is no ambiguity in the description of the diesel generating set, as found in Entry 5(i) of Part 'E' of the First Schedule, there is no need to obtain any expert opinion and such procedure is also not contemplated under the Tamil Nadu General Sales Tax Rules (hereinafter referred to as "the Rules"). He further submitted that as per Rule 26-A of the Rule, on an application by the registered dealer in Form XIV, the Commissioner of Commercial Taxes may clarify any point concerning the rate of tax under the Act and such clarification shall be applicable to the goods specified in the application submitted by the registered dealer. He further submitted that personal hearing is not contemplated under the Act and therefore, there is no need to provide hearing before deciding the application filed under the above said Rule. He also submitted that the opinion of the supplier, viz., BSNL, through its letter dated 30.06.2006, is not binding on the Commissioner of Commercial Taxes, Chennai, the first respondent herein.

10. Heard Mr.T.V.Lakshmanan, learned counsel for the petitioner and Mr.R.Mahadevan, learned Government Advocate for the respondents.

11. The petitioner is a registered dealer and Works Contractor in the diesel generating system and engine alternative sets. By notification under Section 17 of the Act, the Government in G.O.Ms.No.68, dated 18.08.2001, indicated as follows:
"In exercise of the powers conferred by sub-section (1) of section 17 of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), the Governor of Tamil Nadu hereby makes a reduction in rate of tax from twelve per cent to four per cent in respect of the tax payable by any dealer under the said Act on the sale of telecom cables to Thiruvalargal Bharath Sanchar Nigam Limited and Mahanagar Telephone Nigam Limited.

2. The notification shall come into force on the 18th August, 2001."

12. By a subsequent notification in G.O.Ms.No.32, dated 27.03.2002, the Government made some variations in respect of sale of telecom cables. The said notification is extracted hereunder:

"In exercise of the powers conferred by sub-section (3) of section 17 of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), the Governor of Tamil Nadu hereby makes the following variation to the Commercial Taxes Department Notification No.II (1)/CT/45(e-4)/2001, published at page 8 of Part II-Section 1 of the Tamil Nadu Government Gazette, Extraordinary, dated the 18th August, 2001.
VARIATION:- In the said notification, for the expression "telecom cables to Thiruvalargal Bharat Sanchar Nigam Limited and", the expression "switching equipment, sound recording and transmitting equipments of every description including telephones, inter-com device, telephone cables, fibre optic cables, switch board power supply based power plant for telecom application, parts and accessories thereof and batteries for power back up systems for equipment only, to Thiruvalargal Bharat Sanchar Nigam Limited, Videsh Sanchar Nigam Limited and" shall be substituted."

13. The petitioner on his own has filed an application dated 03.05.2006 under Rule 26-A of the TNGST Rules to the first respondent, seeking clarification regarding the applicability of Notification No.II(1)/CT/19(b-17)/2002, G.O.No.32, dated 27.03.2002 effective from 1st April 2002, granting concessional rate of tax in respect of "sale of switching equipment, sound recording and transmitting equipment of every description including telephones, intercom devices, telephone cables, fibre optic cables, switch board, power supply based power plant for telecom application, parts and accessories thereof and batteries for power backup systems for equipment only to Tvl. Bharat Sanchar Nigam Ltd".

14. As per the procedure as contemplated in Rule 26-A, a registered dealer has to submit his application in Form XIV accompanied by proof of payment of required fee. In the instant case, as against the Column No.3 in the application, as to how the name of the goods for which clarification regarding rate of tax is required, the petitioner has mentioned as "Diesel Generating set supplied during execution of Works Contract to BSNL." As against Column No.5, as to how the goods is understood in common parlance or commercial circles, the petitioner has mentioned as "Diesel Generating Sets or Engine alternator sets." Column No.4, deals with full particulars of the goods (Example-its composition and predominant use, supported by a literature or brochure whichever available) and the petitioner has stated that "Diesel Engine coupled to AC Generator as an accessory to power supply based power plant and used as alternate source of energy in the absence of normal electrical power failure." The details provided by the petitioner in Column Nos.3,4 and 5, clearly indicate that the goods sold are "diesel generating sets". At this juncture, it is relevant to point out that the generator sets, transformers, etc., fall under Entry 5(i) of Part 'E' of the First Schedule to the TNGST Act and the same are taxable at 16% at first sale.

15. In the instant case, the assessee himself had categorically admitted in the application submitted before the Special Commissioner and Commissioner of Commercial Taxes, Chennai, first respondent herein that the goods dealt with by them is a diesel engine coupled to AC Generator as an accessory to power supply based power plant and used as an alternate source of energy in the absence of power supply.
16. The concession given by the Government is only in respect of sale of "switching equipment, sound recording and transmitting equipments of every description including telephones, inter-com device, telephone cables, fibre optic cables, switch board power supply based power plant for telecom application, parts and accessories thereof and batteries for power back up systems for

equipment to BSNL" and there is no ambiguity that "diesel generating set" is a distinct and different class from "switch board power supply and power plant for telecom application". All the goods grouped in the above notification relate to electronic items and cables used for the purpose of telecom applications and absolutely there is no reference to diesel generating set, which is not a electronic goods.
17. The judgment in Panama Chemical's case, clearly demonstrates that only in the absence of a specific definition, the doctrine of commercial nomenclature and trade understanding should be applied. The Division Bench has further clarified that in cases where the application of commercial meaning or trade nomenclature runs counter to the statutory context in which, the said word was used, then the said principle of interpretation should not be applicable. In the instant case, "Generating sets, transformers etc., fall under Entry 5(i) of Part 'E' of the First Schedule to the TNGST Act and therefore, theory propounded by the learned counsel for the petitioner is not applicable to the facts of the case. Inasmuch as there is no ambiguity in the true import and meaning of the work "diesel generating set", in the Schedule, the decision in Collector of Customs, Bombay v. United Electrical Industries Ltd., reported in 1999 (108) ELT 609 (S.C), cannot be pressed into service.

18. There is absolutely no quarrel over the principle contained in East Angalia Plastic's case, cited supra, that in construing the relevant item or entry in fiscal statutes, if it is one of every day's use, the concerned authority must normally construe it, as to how it is understood in common parlance or in the commercial work or trade circles. But in the case on hand, when the intention of the Government is to group the goods of the same kind or nature, associated with each other, the attempt of the petitioner to introduce "Generating set" into the cluster of the above mentioned goods would run contrary to the statute.

19. Every article in the statute is referred to by its common name, because of its general use and not by its special use. The user test for determination of a good for finding out its use, to which, it is capable of being put to, has always been held to be logical. When the user test is adopted, the general use of the goods has to be considered for appropriate levy of tax. It is settled law that in the absence of any specific definition in the statute, the word or term used in trade parlance has to be applied. Applying the above said principle to the facts of this case, "a Diesel generating set", commonly used for power generation cannot be equated with a Switch Board Power Supply Plant.

20. As regards the contention of the petitioner that the first respondent ought to have considered the opinion of the BSNL, this Court is of the considered view, the Commercial Tax Officer, Vadapalani II Assessment Circle, second respondent herein, being a quasi-judicial authority ought to have applied his mind independently and he has exceeded in his jurisdiction in seeking opinion from the petitioner's purchasers. If he had any doubt as regards the rate of levy of tax, he ought to have sought opinion from the department only. Nevertheless, the opinion expressed by the Office of the Chief General Manager, BSNL, Tamil Nadu Circle, Chennai-2 dated 30.06.2006, is not binding on the Special Commissioner and Commissioner for Commercial Taxes, Chennai, the first respondent herein, who is empowered to clarify the rate of tax under the Act and the Rules framed thereunder, on the goods specified in the application submitted by the registered dealer.

21. When a dealer has sought for clarification on his own, the Special Commissioner and Commissioner for Commercial Taxes, Chennai, on examination of the materials produced along with the application, can arrive at a conclusion and it is the best judgment for determining the rate of tax applicable to the goods under the statute. For this purpose, the Rule does not contemplate any duty on the Commissioner to seek for any expert opinion and it is purely the subjective satisfaction of the Commissioner, who decides the rate of tax applicable to the goods, as per the statute. As per Rule 26-A, the Commissioner of Commercial taxes, on verification of the details furnished by the

registered dealer, may clarify any point, concerning the rate of tax on the goods under the Act. Such clarification shall be applicable to the goods specified in the application.

22. Coming to the next contention of the petitioner that the respondent ought to have provided personal hearing to them before deciding the application under Section 28-A of the TNGST Act, it has to be decided whether the power exercised by the Commissioner of Commercial Taxes under the Act is Administrative or Quasi-Judicial function.

23. In Engineering Mazdoor Sabha v. Hind Cycles Ltd., reported in AIR 1963 SC 874, the Supreme Court at Paragraph 5, held as follows:
"The distinction between purely administrative or executive acts and judicial or quasi-judicial acts has been considered by this Court on several occasions. In the case of Province of Bombay v. Khushaldas S.Advani, 1950 SCR 621: (AIR 1950 SC 222), Mahajan J. obsered that the question whether an act is a judicial or a quasi-judicial one or a purely executive act depends on the terms of the particular rules and the nature, scope and effect of the particular powers in exercise of which the act may be done and would, therefore, depend on the facts and circumstances of each case. Courts of law established by the State decide cases brought before them judicially and decisions thus recorded by them fall obviously under the category of judicial decisions. Administrative or executive bodies, on the other hand, are often called upon to reach decisions in several matters in a purely administrative or executive manner and these decisions fall clearly under the category of administrative or executive manner and these decisions fall clearly under the category of administrative or executive orders. Even judges have, in certain matters, to act administratively, while administrative or executive authorities may have to act quasi-judicially in dealing with some matters entrusted to their jurisdiction. Where an authority is required to act judicially, either by an express provision of the statute under which it acts or by necessary implication of the said statute, the decisions of such an authority generally amount to quasi-judicial decisions. Where, however, the executive or administrative bodies are not required to act judicially and are competent to deal with the issues referred to them administratively, their issues referred to them administratively, their conclusions cannot be treated as quasi-judicial conclusions."

24. In a decision in Shankarlal Aggarwal v. Shankarlal Poddar reported in AIR 1965 SC 507, the Supreme Court held as follows:
"An administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the Court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a Court, and if the discretion has to be exercised an objective, as distinguished from a purely subjective consideration, it would be a judicial decision."

25. Section 28-A is extracted hereunder:
"28-A. Power to issue clarfication by Commissioner of Commercial Taxes:- (1) The Commissioner of Commercial Taxes, on an application by a registered dealer, may clarify any point concerning the rate of tax under the Act. Such clarification shall be applicable to the goods specified in the application:
Provided that no such application shall be entertained unless it is accompanied by proof of payment of such fee, paid in such manner, as may be prescribed.
(2) The Commissioner of Commercial Taxes may, if he considers it necessary or expedient so to do, for the purpose of uniformity in the work of assessment and collection of tax, clarify any point concerning the rate of tax under this Act or the procedure relating to assessment and collection of tax as provided for under this Act.

(3) All persons working under the control of Commissioner of Commercial Taxes shall observe and follow the clarification issued under sub-section (1) and sub-section (2)."

Under Clause (1) of Section 28-A of the TNGST Act, the dealer comes forward on his own, seeking clarifications as to the rate of tax to be levied on any particular goods mentioned in the application and under Clause (2), the Commissioner of Commercial Taxes, for the purpose of uniformity in the work assessment and collection of tax, clarify any point concerning the rate of tax.

26. Applying the principles stated supra, the Commissioner of Commercial Taxes, in the absence of any lis or contest or attributes of a quasi-judicial authority to make an enquiry, the discretion conferred being classificatory in nature, to maintain uniformity in the work assessment and collection of tax, the exercise of the functions, in my considered view could be termed only as regulatory, supervisory and therefore, administrative in nature and not quasi-judicial.

27. In a case, where statute provides that an individual should be given a reasonable opportunity before any decision is taken, then the decision taken by the authority can be termed as quasi-judicial. In the absence of any specific provision laying down a procedure of affording an opportunity, there is no need to provide personal hearing before deciding an application under Section 28-A of the Act. The decision of the Commissioner of the Commercial Taxes, dated 24.07.2006 cannot be termed as arbitrary or unjust. Therefore, in the absence of any procedural violation, the discretion exercised by the Commissioner of Commercial Taxes, is reasonable, fair and in conformity with Section 28-A of the Act, I do not find that any valid reasons to hold that the impugned clarification is arbitrary and illegal.

28 In the result, the Writ Petition is dismissed. No costs.

14.11.2007
INDEX: Yes
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S. MANIKUMAR, J.

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To
1. The Special Commissioner &
Commissioner of Commercial Taxes,
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